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In The

Supreme Court of the United States

CARL T.C. GUTIERREZ and
MADELEINE Z. BORDALLO,

Petitioners,

vs.

JOSEPH F. ADA and FELIX P. CAMACHO,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONERS' OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Did the Ninth Circuit prejudicially err in holding that the first paragraph of the Organic Act of Guam (48 U.S.C. § 1422), which is applicable solely to gubernatorial elections and requires runoff elections only when a gubernatorial slate has not received a majority of votes in that election, forced a runoff election despite petitioners having received the majority of all valid votes cast in the gubernatorial race

(1) by rewriting the statutory words "in any election" to state "in any general election in which the gubernatorial election is a part,"

(2) by rewriting the statutory words a "majority of the votes cast in any election" to mean a "majority of ballots cast in any general election," and

(3) by counting as "votes" ballots that are invalid under Guam election statutes, thereby placing the Ninth Circuit in direct conflict with the Third Circuit's interpretation of the identical language of the Virgin Islands Organic Act (48 U.S.C. § 1591) in *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982)?

PARTIES

The parties are petitioners Carl T.C. Gutierrez and Madeleine Z. Bordallo and respondents Joseph F. Ada and Felix P. Camacho.[1]

[1] The Government of Guam and the Guam Election Commission and its Commissioners were named as defendants in the proceeding in the United States District Court for the District of Guam, but they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit and are not parties to the proceeding before this Court.

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PETITIONERS' OPENING BRIEF ON THE MERITS

This Court's order granting certiorari is published at 68 U.S.L.W. 3153, 1999 U.S. LEXIS 4724, 1999 WL 459546 (Sept. 10, 1999).

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 179 F.3d 672 (9th Cir. 1999). (Appendix to Petition for Writ of Certiorari ("Pet. App.") A-1.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (Pet. App. A-61.)

The opinion and order of the United States District Court for the District of Guam is unpublished. (Pet. App. A-24.) The decision and order of the Superior Court of Guam in *Ada v. Gutierrez*, No. CV 2765-98 (Feb. 16, 1999), is unpublished. (Appellants' Additional Citations, filed Feb. 24, 1999.)

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 19, 1999. That court denied a timely petition for rehearing and suggestion for hearing en banc on May 25, 1999. The petition for a writ of certiorari was filed on July 2, 1999. This Court granted the petition for a writ of certiorari on September 10, 1999.

The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 48 U.S.C. § 1422.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Federal Statutes

The Organic Act of Guam, 48 U.S.C. § 1422, first paragraph, provides:

> The executive power of Guam shall be vested in an executive officer whose official title shall be the "Governor of Guam". The Governor of Guam, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the Legislature of Guam. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election. The Governor and Lieutenant Governor shall hold office for a term of four years and until their successors are elected and qualified.[2]

The Virgin Islands Organic Act, 48 U.S.C. § 1591, first paragraph, provides in pertinent part:

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[2] The remainder of Section 1422 is unrelated to gubernatorial elections.

> The Governor of the Virgin Islands, together with the Lieutenant Governor, shall be elected by a majority of the votes cast by the people who are qualified to vote for the members of the legislature of the Virgin Islands. The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast in any election, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast.

The Organic Act of Guam, codified as 48 U.S.C. § 1423a, provides in pertinent part:

> The legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam. . . .

The same Act, codified as 48 U.S.C. § 1423i, provides in pertinent part:

> Every bill passed by the legislature shall, before it becomes a law, be entered upon the journal and presented to the Governor. If he approves it, he shall sign it. . . . The Congress of the United States reserves the power and authority to annul the same.

Before its amendment in 1968, § 1423i provided in the last sentence:

> If any such law is not annulled by the Congress of the United States within one year of the date

of its receipt by that body, it shall be deemed to have been approved.

B. Guam Election Statutes

Title 3 of the Guam Code Annotated ("G.C.A."), § 11111 provides:

> At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.[3]

Title 3 of G.C.A. § 11114 provides:

> If a voter indicates either:
>
> (a) By placing his marks in the voting squares adjacent to the names of any candidates, or
>
> (b) By writing the names of persons for an office in the blank spaces, or
>
> (c) By a combination of both, the choice of more than there are candidates to be elected or certified for any office, or if for any reason it is impossible to determine his choice for any office, his ballot shall not be counted for

[3] This statute was derived from the Guam Code § 2518 enacted in 1952. Section 2518 was repealed and added by P.L. 7-164, effective August 28, 1964. Section 2518 was then repealed and re-enacted by P.L. 11-209, effective January 1, 1973, recodified as Guam Code § 2511. Section 2511 was thereafter recodified as 3 G.C.A. § 11111. No substantive changes were made during this legislative history.

> that office, but the rest of his ballot, if properly marked, shall be counted.[4]

Title 3 of G.C.A. § 11123 provides:

> As soon as all the votes for such precinct are counted and the ballots sealed, the Election Commission shall certify the results of the election in that precinct. The final certification shall be signed by a majority of the Commission.[5]

STATEMENT OF THE CASE

On November 3, 1998, Guam held a general election in which Carl T.C. Gutierrez and Madeleine Z. Bordallo ("Gutierrez") ran against Joseph F. Ada and Felix P. Camacho ("Ada") for the offices of Governor and Lieutenant Governor, respectively. Only two gubernatorial slates were running. (Joint Appendix ("J.A.") 16.) Pursuant to 48 U.S.C. § 1422, each voter who chose to vote in the

[4] Section 11114 was derived from former Guam Code § 2520 enacted in 1952. That statute was repealed and added by P.L. 7-164, effective August 28, 1964 and thereafter amended by P.L. 8-54, effective August 7, 1965. Guam Code § 2520 was thereafter repealed and re-enacted by P.L. 11-209, effective January 1, 1973, as amended by P.L. 12-149, effective June 19, 1974 and redesignated as Guam Code § 2514. Guam Code § 2520 and Guam Code § 2514 are identical. Guam Code § 2514 was thereafter recodified without any language change as 3 G.C.A. § 11114.

[5] Section 11123 was initially enacted in 1952. It was repealed and added by P.L. 7-164, effective August 28, 1964. It was thereafter repealed and re-enacted by P.L. 11-209, effective January 1, 1973, and thereafter codified as 3 G.C.A. § 11123. No change in language occurred.

gubernatorial race was to cast a single vote for the two offices on the slate.

Although more than 1,000,000 votes were cast for various candidates in all the races in the general election, less than 50,000 votes were cast in the gubernatorial contest.[6] The Gutierrez slate received 24,250 votes, and the Ada slate received 21,200 votes, giving Gutierrez a marginal 3,050 votes. (J.A. 16.) Of the additional persons who voted for offices other than Governor and Lieutenant Governor, 1,313 persons left the gubernatorial spaces blank, 609 persons voted for both slates, and 1,294 persons filled in the space indicating that they intended to vote for a write-in candidate. (J.A. 16.) However, of the 1,294 persons indicating they intended to vote for a write-in candidate for governor, only 275 wrote in the name of any candidate. (J.A. 16.) Thus, 1,019 of those "write-in" ballots contained no vote in the gubernatorial election. (Declaration of Joseph T. Duenas, filed Dec. 9, 1998 (Rec. No. 29-1), at page 2, ¶ 7.)[7]

The total number of ballots returned with respect to all races was 48,666. The Guam Election Commission

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[6] The November 3, 1998 general election consisted of four races: (1) the gubernatorial election, (2) election to the Guam Legislature, (3) election of the United States Delegate, and (4) election of the school board. All four races were consolidated on one ballot. The 1,000,000 total votes is reached by adding every vote in all four races. (J.A. 16-20.)

[7] If any one of these three described categories of "votes" – (1) the 1,313 blank ballots, (2) the 609 double-voted ballots, or (3) the 1,019 "write-in" ballots with no candidate named – should have been excluded by the Guam Election Commission, the Gutierrez slate won.

deducted the 1,313 ballots that were blank with respect to the gubernatorial race. The Commission then certified that the Gutierrez slate had won, with 51.21% of the votes cast (24,250/47,353 = 51.21%). (Pet. App. A-25.)[8]

On December 1, 1998, Ada filed a complaint in the United States District Court for the District of Guam seeking a declaration that the Gutierrez slate had not won and for mandamus to compel a runoff election. (J.A. 5.) On that same day Ada also filed a lawsuit in the Guam Superior Court alleging voting irregularities and challenging the Guam Election Commission's certification. *Ada v. Gutierrez*, No. CV 2765-98 (Guam Super. Ct.). (See Appellants' Additional Citations, filed Feb. 24, 1999, at page 1.)

On December 9, 1998, the district court ruled in Ada's favor. The court held that all *ballots* in the *general election* had to be counted as "votes cast" in the gubernatorial race to determine a majority, including those on which no gubernatorial vote was cast or which were invalid because they contained overvotes. As thus construed, the district court held that Gutierrez failed by 83

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[8] The Election Commission did not reach the question whether the 609 persons who voted for both slates ("overvotes") should be counted for either or neither of the slates; nor did the Commission make any decision with respect to those persons who indicated they intended to vote for a write-in candidate, but who did not name a candidate. By deciding that the 1,313 persons who left the gubernatorial spaces blank had not cast any vote in the gubernatorial race, the Gutierrez slate won without reaching the question of validity of overvotes or voters who failed to write in names of other candidates.

votes to achieve a majority, and it ordered a runoff election to be held on December 19, 1998. (Pet. App. A-53 – A-55.)[9]

The Gutierrez slate immediately filed an appeal and an emergency motion to stay the runoff election. By unpublished order the court of appeals granted the stay motion, on December 15, 1998. (Pet. App. A-57.)

On February 16, 1999, the Guam Superior Court found that Ada had failed to prove the allegations of election irregularities; it held that the Gutierrez slate had won. *Ada v. Gutierrez*, No. CV 2765-98 (Guam Super. Ct.). (Appellants' Additional Citations, filed Feb. 24, 1999.) Ada appealed.[10]

The Court of Appeals for the Ninth Circuit affirmed the district court's decision by an opinion filed April 19, 1999. 179 F.3d 672 (9th Cir. 1999). (Pet. App. A-1.)[11] The court reached three erroneous conclusions:

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[9] By thus counting ballots blank as to the gubernatorial race, ballots indicating a desire to write in gubernatorial names which thereafter contained no such names, and ballots on which votes were cast for both slates, the district court concluded that 24,333 votes were necessary for Gutierrez to receive a majority. (See Pet. App. A-25.)

[10] That appeal has been scheduled for argument before the Guam Supreme Court the first week of November, 1999.

[11] No mandate has gone down because the court of appeals stayed its mandate pending the filing of the certiorari petition; and the stay continued when the certiorari petition was filed and thereafter granted. (Order, filed May 27, 1999; Order, filed July 21, 1999.)

(1) The words "in any election" as used in the clause "[i]f no candidates receive a majority of the votes cast *in any election*" [emphasis added] could *not* refer to the gubernatorial election because the words "in any election" would thereby be "a nullity." (Pet. App. A-9.)

(2) By the words "in any election" Congress meant the general election of which the gubernatorial election was a part. (Pet. App. A-9 – A-10.)

(3) Although the court acknowledged that counting all of the "votes cast" at the general election to determine the gubernatorial race would reach an "absurd result" unintended by Congress, it could avoid the absurdity by reading the words "votes cast" as if Congress had said "ballots issued and returned in the general election." (Pet. App. A-10 & n.5.)

SUMMARY OF THE ARGUMENT

The Ninth Circuit seriously misconstrued Section 1422. In context, the phrase "in any election" plainly means "in any *gubernatorial* election," beginning with the first gubernatorial race in which no other contest was on the ballot and thereafter in every gubernatorial election held concurrently with the general election. In context, the phrase "majority of the votes cast" plainly means the majority of the votes cast in the gubernatorial race "by the casting by each voter of a single vote applicable to both offices."

The court below recognized that its construction of the statute leads to an absurdity that Congress did not intend. It unsuccessfully tried to avoid the absurdity by impermissibly rewriting Section 1422 to change the words "votes cast" in the gubernatorial election to "ballots cast" at the general election. Congress knew the difference between "ballots" and "votes." Moreover, it was aware that separate ballots had been used in Guam not only in gubernatorial elections, but also in elections for Guam's Delegate to Congress. It had no intention to change the results of gubernatorial elections based on whether ballots were or were not separate for gubernatorial elections and any other contests in a general election.

By counting as "votes cast" in the gubernatorial election ballots on which voters made no discernible choice in that race, the court violated the election law presumption settled since this Court decided *County of Cass v. Johnston*, 95 U.S. 360, 369, 24 L.Ed. 416 (1877): Voters who do not choose to vote in a particular race are presumed to assent to the will of those persons who do vote in that contest.

The decision below is in conflict with the Third Circuit on the election law point. In *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), the court construed the language of the Organic Act of the Virgin Islands, 48 U.S.C. § 1591, which is identical to that appearing in Section 1422; and it held that entirely blank ballots and ballots blank as to the gubernatorial race could not be counted in computing the majority in an election. Votes which are not cast cannot be deemed "votes cast" in that contest.

The Ninth Circuit erroneously disregarded or invalidated the applicable election laws of Guam, theretofore approved by Congress, with respect to the validity of votes cast in Guam elections. Guam election statutes do not permit to be counted votes that are blank in the gubernatorial race or ballots on which voters made no discernible choice in that election.

Congress never intended to require a runoff election when only two gubernatorial slates ran against each other. The runoff provision was intended to foreclose election of a gubernatorial slate by a mere plurality when one slate in a multi-slate contest received less than the majority of the votes validly and actually cast.

ARGUMENT

I. THE COURT MISREAD SECTION 1422 AND THEREAFTER REWROTE THE STATUTE IN A VAIN ATTEMPT TO AVOID THE ABSURDITY THAT ITS MISCONSTRUCTION CREATED

Introduction. According to the court of appeals, the Guam Election Commission should not have tallied the valid votes for each gubernatorial slate and votes cast for write-in candidates and compared the totals with one another to determine whether either slate had won a majority; instead, it should have tallied the votes cast for both slates and compared those totals with all of the "ballots cast" in which a vote had been cast for any candidate in any race in the general election, to decide whether either slate had won a majority in the gubernatorial election. In reaching its startling conclusions, the

court isolated three words from the five key sentences in the first paragraph of Section 1422, disregarded the context in which the words were used, and substantively rewrote the statute to try to escape the "absurdity" that its misconstruction created. If not overturned, the decision subjects the citizens of Guam to the prospect of unnecessary, wasteful and politically destabilizing gubernatorial runoffs in this election and in every future gubernatorial election.

A. The Court Misconstrued the Words "In Any Election" in Section 1422

Congressional intent in using the words "in any election" is evident when the key sentences are read together – Congress meant "in any *gubernatorial* election":

> The Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. If no candidates receive a majority of the votes cast *in any election*, on the fourteenth day thereafter a runoff election shall be held between the candidates for Governor and Lieutenant Governor receiving the highest and second highest number of votes cast. The first election for Governor and Lieutenant Governor shall be held on November 3, 1970. Thereafter, beginning with the year 1974, the Governor and Lieutenant Governor shall be elected every four years at the general election.

48 U.S.C. § 1422 (emphasis added).

The phrase "in any election" in the second quoted sentence could refer only to candidates in the gubernatorial election because the same sentence refers to a "runoff election" for Governor and Lieutenant Governor; no such runoff election could occur in any other contest on the general ballot.

The only mention of the general election is in the last sentence; and Congress' only purpose in referring to the general election in the last sentence was to set the *time* for later gubernatorial elections, just as it had set the date for the first election in the immediately preceding sentence and set the time for runoff elections earlier in the same paragraph.

The "majority of the votes cast" plainly means a majority of the votes cast for Governor and Lieutenant Governor. The immediately preceding sentence not only specifies that the Governor and Lieutenant Governor are chosen jointly, it also specifies the manner in which each voter shall cast a vote in that race, *i.e.*, "by the casting by each voter of a single vote applicable to both offices." No other federal statute and no local statute applicable to this general election required a single vote for two offices.

The last two sentences quoted establish that the words "in any election" referred to the first election on November 3, 1970 (restricted to the first gubernatorial contest) and thereafter to every succeeding quadrennial election for Governor and Lieutenant Governor to be held concurrently with the general election.

Rather than construing together those simple declarative sentences of the statute, the court changed the words "in any election" into a pivot on which the whole

paragraph turns, thereby disregarding standard principles of statutory construction:

> Section 1422 provides for a runoff election in the event that "no candidates receive a majority of the votes cast in any election." Because Congress provided no other direction in § 1422 for determining what constitutes a majority, we must give effect to these words. We read "votes cast" as including all votes cast at the general election, for Congress presumably would not have included the phrase "in any election," if it meant to refer only to the votes cast in the single election for governor and lieutenant governor. (Pet. App. A-8 – A-9.)
>
> • • •
>
> This phrase ["by the casting by each voter of a single vote applicable to both offices"] merely establishes the requirement that candidates for governor and lieutenant governor run on a single slate. It is the sentence using the phrase "in any election" that establishes the majority requirement and, therefore, that should be accorded greater weight. The better interpretation is that Congress intended "votes cast" to constitute the votes cast for *any* of the offices up for election at that general election; that is, the number of ballots cast. (Pet. App. A-9 – A-10 (emphasis in original).)

The phrase "in any election," meaning "in any gubernatorial election," is not a nullity; it is the simple and logical way to state that in each gubernatorial election the majority test will be applied to the votes in that election. The statute provides for many gubernatorial elections –

the first on November 3, 1970, and one every four years thereafter.

The court incorrectly stated that the words "Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices" in the statute "merely establishes a requirement that candidates for governor and lieutenant governor run on a single slate." "Merely" is out of place. The provision establishes that requirement, but it does more: The entire section is also unmistakably based on the premise that *a vote is cast* by making an *actual selection on the ballot*. A vote is not cast if the voter does not cast one vote applicable to both offices.

The court acknowledged that its interpretation of the statute resulted in an absurdity which "strongly suggests that this was not Congress' intent." (Pet. App. A-10, n.5.) That recognition should have – but did not – alert the court that it had not read the statute correctly.

B. The Court Impermissibly Rewrote Section 1422

After the court cut away the words "in any election" from its contextual mooring, it veered even further off course by rewriting the statute to change "votes cast" in the gubernatorial election to "ballots cast" at the general election:

> Gutierrez argues that this interpretation of § 1422 is absurd because it would require the victor to receive a majority of the sum of all votes cast for all offices voted on at the election. That is, a candidate would have to receive a majority of the approximately 1 million votes

that were cast for all candidates for the various offices. The absurdity of this result strongly suggests that this was not Congress' intent. Our interpretation, however, can give substance to the phrase "in any election" without requiring this result. "Votes cast" does not necessarily mean individual votes cast for particular candidates. For example, a "vote cast" in an election can be equivalent to a ballot cast on which an individual voted for at least one candidate. Admittedly, this interpretation equates "votes cast" with "ballots cast." However, giving effect to the phrase "in any election" in such a way as to avoid an absurdity is preferable to reading the phrase out of the statute entirely. (Pet. App. A-10, n.5.)

The statute expressly requires votes to be cast in gubernatorial elections in the prescribed manner, and it requires the actual "casting" of a vote. It says nothing whatever about ballots. Who, better than a member of Congress, would know the difference between a ballot and a vote? An assumption that members of Congress failed to distinguish ballots from votes is untenable in the light of legislative history and political reality. Even if the court could have permissibly rewritten the statute (and it could not), its revisions do not eradicate the absurdity which its own construction had created. It makes neither statutory nor common sense to require the Election Commission to count ballots stating no choice for Governor and Lieutenant Governor in order to decide whether voters who did cast their votes for those offices gave a majority of votes to one of the two slates. Votes that are *not* cast do not become cast by "each voter of a single

vote applicable to both offices" as Section 1422 explicitly requires.

Despite the explicit statutory instruction, the court said:

> [T]he text of § 1422 and the differences between it and [48 U.S.C.] § 1712 make clear that "a majority of the votes cast in any election" means that a gubernatorial slate must receive a majority of all votes cast in the general election, whether they be, with respect to the gubernatorial race, undervotes, overvotes, write-in votes, or votes for one of the slates. (Pet. App. A-11.)

The court could scarcely have spoken more plainly when it decided that "undervotes" – ballots blank in the gubernatorial elections – were "votes cast."

The Guam Election Commission counted the overvotes solely for the purpose of computing the total ballots cast, but it did not count or allocate the markings on ballots that showed votes for both respective gubernatorial slates. Even if overvotes should have been counted (and they should not, because the votes are invalid under the Guam election statutes), the Gutierrez slate had the majority. If the 609 overvotes were divided 304 votes for the Gutierrez slate and 305 for the Ada slate, the total votes for Gutierrez would be 24,554 or 50.45 percent. (24,554/48,666=50.45%.) The Ada slate would have received 21,505 votes or 44.18 percent. (21,505/48,666=44.18%.) (Indeed, even if each slate is credited with 609 votes, Gutierrez still has a majority.)

C. The Court Overlooked Pertinent Statutory History

Section 1422 of Title 48, initially enacted on August 1, 1950, was amended on September 11, 1968 and October 19, 1982. In 1972, Congress enacted 48 U.S.C. § 1712, requiring that ballots for the election of Guam's Delegate to Congress be printed on separate ballots from any other elective race, even if those contests were held concurrently.[12] By amending Section 1422 in 1982, therefore, Congress could not have intended "votes cast" in the gubernatorial race to mean the majority of "ballots cast" because Congress knew that separate ballots were issued in Guam's elections when the Delegate races were run concurrently with other races in a general election.[13]

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[12] As enacted in 1972, Section 1712 provided, in relevant part:

> The Delegate shall be elected by the people qualified to vote for the members of the legislature of the territory he is to represent at the general election of 1972, and thereafter at such general election every second year thereafter. The Delegate shall be elected at large, by separate ballot and by a majority of the votes cast for the office of Delegate. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes for the office of Delegate. . . .

[13] Under Guam law, enacted in 1952, Guam Government Code § 2384 provided that "one (1) ballot or one set of ballots shall be given to each voter." Guam Government Code § 2384 was re-codified, in identical form, as Title 3 G.C.A. § 9131. The Guam Legislature thus recognized that more than one set of ballots could be furnished to each voter in a general election.

In 1998, Congress amended 48 U.S.C. § 1712, removing the separate ballot requirement for the election of the Guam Delegate, although Congress retained the separate ballot provision as to the Virgin Islands. In pertinent part, Section 1712 now provides:

> The Delegate from the Virgin Islands shall be elected at large, by separate ballot and by a majority of the votes cast for the office of Delegate. The Delegate from Guam shall be elected at large and by a majority of the votes cast for the office of Delegate. If no candidate receives such majority, on the fourteenth day following such election a runoff election shall be held between the candidates receiving the highest and the second highest number of votes cast for the office of Delegate. . . .

Pursuant to the removal of the separate ballot requirement, as authorized by 48 U.S.C. § 1712, and under the authority of Title 3 G.C.A. § 9131, the Guam Election Commission consolidated all the ballots (Gubernatorial, Senatorial, School Board, and Delegate) in the 1998 general election.

The Ninth Circuit's holding that "votes cast means ballots cast" will therefore produce a different result depending on whether the Guam Election Commission or the Guam Legislature decides to separate or consolidate the ballots. Congress has never manifested any intent to change the outcome of gubernatorial races in Guam depending upon whether gubernatorial ballots were printed separately from ballots in any other contest held at the same time.

II. BY COUNTING AS VOTES CAST IN THE GUBERNATORIAL ELECTION BALLOTS ON WHICH VOTERS MADE NO DISCERNIBLE CHOICE IN THAT RACE, THE COURT VIOLATED SETTLED PRINCIPLES OF ELECTION LAW

A. The Election Law Presumption of This Court Stated in *County of Cass v. Johnston* Controls

Johnston states the basic rule:

> This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulation to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.

County of Cass v. Johnston, 95 U.S. 360, 369, 24 L.Ed. 416 (1877).

In *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 560, 57 S.Ct. 592, 81 L.Ed. 789 (1937), the Court applied the *Johnston* presumption in deciding whether railway craftsmen had properly elected the Federation to represent them by receiving a majority vote of the affected railroad employees. A majority of petitioner's employees in its mechanical department who chose to vote in the election cast their votes for the Federation. Petitioner challenged certification of the Federation contending that the Railway Labor Act's requirement that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act" meant that a representative must be selected by the votes

of a majority of all eligible voters which included *nonvoting* eligible members. The Court rejected the argument:

> Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County v. Smith*, 111 U.S. 556; *Douglass v. Pike County*, 101 U.S. 677; [additional citations omitted]. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." *Cass County v. Johnston*, 95 U.S. 360, 369, and see *Carroll County v. Smith, supra.*

300 U.S. at 560.

The Court explained the value of adherence to that principle:

> If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest and thwart the purpose of the Act, which is dependent for its operation upon the selection of representatives.

Id.

Congress is deemed to have followed relevant judicial interpretations rendered before the statute was passed, unless it makes clear that a different interpretation is intended. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). When Congress initially passed Section 1422 in 1968, it implicitly adopted the *Johnston* presumption: Persons who do not vote are presumed to assent to the will of the majority of those who

have "expressed [the] will of the majority of those voting." *Virginian Railway Co.*, 300 U.S. at 560. The decision below conflicts with election law principles established by this Court and permits indifferent voters to thwart the will of those who cast valid votes for Governor and Lieutenant Governor.

B. The Ninth Circuit Is in Conflict With the Third Circuit on the Election Law Point

In *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), the District Court of the Virgin Islands ordered a runoff election for the offices of Governor and Lieutenant Governor. The revised Organic Act of the Virgin Islands, 48 U.S.C. § 1591, contains language identical to that in Section 1422, except for the name of the Territory. The Board of Elections for the Virgin Islands reported that there were 134 entirely blank ballots and 500 ballots blank as to the offices of Governor and Lieutenant Governor; there were also 922 entirely spoiled ballots and 571 ballots spoiled as to the gubernatorial race. One of several gubernatorial slates had a majority of the votes cast unless the blank ballots and the ballots blank as to Governor and Lieutenant Governor were counted; but the district court required such ballots to be included in computing a majority.

The Third Circuit reversed, holding that entirely blank ballots and ballots blank as to the gubernatorial race could *not* be counted in determining the victors.[14] In reaching its conclusion, the court stated:

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[14] The Third Circuit did not reach the question whether spoiled ballots should be counted, because the elimination of the blank ballots determined the outcome of the election. 694 F.2d at 941.

> [W]e note that in *Euwema v. Todman*, 8 V.I. 224 (D.V.I. 1971), Judge Almeric Christian stated that "the proper basis for computing a majority" was that "voters not attending the election or not voting on the matter submitted are presumed to assent to the expressed will of those attending and voting and are not to be taken into consideration in determining the result." *Id.* at 231. We agree with this statement of the law.

694 F.2d at 941.[15]

C. The Court Incorrectly Invalidated the Applicable Guam Election Laws and Disregarded the Construction of the Applicable Election Laws by the Guam Election Commission and by Congress

The election laws of Guam do not permit blank ballots, "overvotes" (votes for more than one slate in the gubernatorial race) or spoiled ballots to be counted. Sections 11111 and 11114 of the Guam Elections Law provide, respectively, that "any ballot which is not marked as provided by law shall be void," and that, "if for any reason it is impossible to determine [a voter's] choice for any office, his ballot shall not be counted for that office . . . . " Construing the Guam election statutes and 48 U.S.C. § 1422, the Guam Election Commission did not

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[15] The *Euwema* court relied on the election presumption established by *Johnston, supra.*

count as "votes cast" any of the ballots that were blank in the gubernatorial race. By excluding only those blank ballots, the Gutierrez slate had a majority, and the Commission was not required to reach the questions of overvotes or spoiled ballots to decide the outcome.

The Commission's interpretation of both the federal and territorial statutes was entitled to deference because its interpretation was inconsistent neither with the statutory mandate nor with the policy of Congress or of the Guam legislature in enacting those statutes. *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981) ("[t]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court"). The principle was similarly stated in *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) ("[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration").

The court below likewise rejected the House of Representatives' interpretation of the phrase "by a majority of the votes cast" found in 48 U.S.C. § 1712 governing the election of a Guam Delegate to the House. The House adopted Report 99-220 by the Committee on House Administration, dismissing an election contest challenging the Guam Election Commission's certification of Ben Blaz as the winner of the race for Guam's Delegate to the House in November 1984. The contestant, Won Pat,

argued that the Guam Election Commission had misinterpreted the words "majority of the votes cast" because it refused to count overvotes or undervotes in the contest. In reaching its conclusion, the House Committee relied on *Todman v. Boschulte*, 694 F.2d 939 (3d Cir. 1982), and on the election laws of Guam. The Committee Report stated:

> The holding in *Todman* enjoys general acceptance in jurisdictions covered by statutory provisions similar or identical to Guam's. This Committee concurs in the logic of *Todman:* a voter who does not mark his ballot is presumed to assent to the choice of those who do.[16]

The House accepted the decision of the Guam Election Commission that blank ballots should not be counted as "votes cast":

> In summary, the decision of the [Guam Election] Commission not to include blank ballots in the total of votes cast is well supported in logic and precedent. Even without the usual deference extended to states and territories in the interpretation of their election codes, the Committee would come to no different conclusion.[17]

Based on the Committee's report, the House passed a resolution dismissing the election contest by the loser.[18]

The court below rejected the Congressional interpretation of "by a majority of the votes cast" in Section 1712 because it said that the statutory provisions defining

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[16] *Dismissing the Election Contest Against Ben Blaz*, H.R. Rep. No. 220, 99th Cong., 1st Sess. (1985).

[17] *Id.*

[18] 99 Cong. Rec. 20180-81 (July 24, 1985).

the relevant majority were different: Section 1712 states that "[t]he Delegate shall be elected . . . . by a majority of the votes cast *for the office of Delegate.*" (Emphasis by the court.)[19] The court concluded:

> Therefore, § 1712's text clearly excludes undervotes, because such ballots do not cast a vote for this particular office. In contrast, § 1422 requires "a majority of the votes cast *in any election.*" § 1422 (emphasis added). At the very least, the text of § 1422 leaves open the possibility that undervotes should be included. (Pet. App. A-13 (emphasis by the court).)

The court below incorrectly assumed that Congress would have used the same language with respect to gubernatorial elections in Section 1422 as it did with respect to the election of the Guam Delegate four years later. Whatever the later Congress may have intended in passing Section 1712 cannot be imputed to an earlier Congress with respect to a different statute. The later Congress unquestionably knew the difference between votes cast and ballots. If the later Congress believed that Section 1422 did not mean valid votes actually cast in the gubernatorial race, it could readily have amended the statute. It did not do so.

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[19] When the House was considering the Blaz contest, Section 1712 provided that an election for the Delegate was by separate ballot. Congress subsequently amended Guam's Organic Act to remove the separate ballot requirement for the Guam Delegate election. See Section I(C), *supra*.

D. The Ninth Circuit Opinion Disregarded Its Own Prior Opinion and 48 U.S.C. §§ 1423a and 1423i

In *Ramsey v. Chaco*, 549 F.2d 1335 (9th Cir. 1977), the court stated:

> Prior to amendment in 1968, however, the Organic Act also provided that all laws enacted by the Guam legislature ultimately should be reported to Congress, and unless Congress acted to annul the law within one year, it was deemed to have congressional approval. Guam Organic Act § 19, ch. 512, § 19, 64 Stat. 389 (1950), *as amended* 48 U.S.C. § 1423i.

549 F.2d at 1338.[20]

The *Ramsey* court decided that a law granting tax rebates passed by the Guam Legislature and submitted to Congress while a pre-1968 Organic Act provision was still in force had received approval under former Section 19 of the Organic Act, because Congress had failed to annul the law within one year. Title 3 G.C.A. §§ 11111, 11114, and 11123 originated from statutes of Guam enacted in 1952 that were re-enacted and recodified without substantive change thereafter. Congress did not annul those pre-1968 statutes within one year; they are, therefore, deemed to have received "approval under former Section 19 of the Organic Act."

Because Congress is deemed to have approved Guam's election statutes, those statutes are not merely

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[20] Section 19 was amended in 1968 to eliminate the provision for implied Congressional approval. *Id.*

the local laws of Guam. Sections 11111, 11114 and 11123 of Title 3 of the Guam Code Annotated require that the only votes that can be counted in the gubernatorial race are those valid votes that have been actually cast in favor of a slate on the ballot or by valid write-in votes for Governor and Lieutenant Governor. Overvotes, votes blank for that race, and ballots on which it is impossible to determine the voter's choice are not counted.

The lower court's cavalier invalidation of significant parts of Guam's election statutes is not sustainable. Congress explicitly reserved to itself, in 48 U.S.C. § 1423i, the right to annul Guam statutes, leaving to the federal judiciary solely invalidation of Guam's election laws under established principles of judicial review. Those election statutes are not inconsistent with anything in Section 1422. In reaching the opposite conclusion, the court read Section 1422 as if Congress intended that when votes in Guam cannot be counted, ballots will be counted. Elections count votes, not pieces of paper in a ballot box.

E. Runoff Elections Were Never Intended To Provide Losers in a Two-Slate Race With a Second Bite at the Election Apple

When there are only two slates in a gubernatorial election, it is senseless to require a "runoff election" between the two slates "receiving the highest and second highest number of votes cast."[21] The purpose of the

[21] Scattered write-in votes cannot change the result because even if the losing party received all the write-in votes, Gutierrez would still have a majority.

runoff provision and the "majority of the votes cast" language was to foreclose election of a gubernatorial slate by a mere plurality when that slate received less than a majority of the votes validly and actually cast for any other slate in the race among more than two slates. That purpose would not be served by counting blank ballots.

CONCLUSION

For all of the reasons hereinabove stated, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and that portion of the judgment affirming the District Court of Guam's order directing runoff elections for Governor and Lieutenant Governor of Guam should be vacated.

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Respectfully submitted,

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